Supreme Court, U.S.
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No. 07-

In The
Supreme Court of the United States
October Term, 2006

CITY OF ABERDEEN, SOUTH DAKOTA,
Petitioner,

v.

ROB SENGER, MIKE ELIASON, JEFF FIFERLICK, MARIO GOURDE, AUSTIN HEARNEN, ROB JOHNSON, BROOKS KLEFFMAN, TIM A. MEDENWALD, and KEITH A. SHARISKY,
Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether § 207(a) of the Fair Labor Standards Act (FLSA) applies to employee firefighters.

II. Whether the FLSA requires the employee claiming the overtime to actually work the excess hours.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b), the undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made so that the Justices of this Court may evaluate any possible disqualification or necessary recusal.

Petitioner	Respondents
City of Aberdeen, South Dakota	Rob Senger, Mike Eliason, Jeff Fiferlick, Mario Gourde, Austin Hearnen, Rob Johnson, Brooks Kleffman, Tim A. Medenwald, and Keith A. Sharisky

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Petitioner, City of Aberdeen, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Senger v. City of Aberdeen, S.D.* 466 F3d 670 (8thCir 2006), and is reprinted in the Appendix hereto at A1 through A12. The opinion of the District Court is reported at *Senger v. City of Aberdeen, S.D.*, 2005 WL 2257076 (DSD 2005), and is reprinted in the Appendix at B1 through B8. The Order of the Court of Appeals denying the petition for rehearing *en banc* is unreported and is reprinted in the Appendix at C1 through C2.

JURISDICTION

The decision of the Court of Appeals of which review is sought was rendered in an opinion filed on September 29, 2006. App. at A1. The Order of the Court of Appeals denying the timely filed petition for rehearing *en banc* was filed November 8, 2006. App. at C1. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(2).

STATUTORY PROVISIONS INVOLVED

This case was brought pursuant to 29 USC § 216(b), which is set out in its entirety in the Appendix at D1 through D5. Respondents alleged that Petitioner was guilty of violations of the overtime provisions of the Fair Labor Standards Act (FLSA), 29 USC § 207, which is set out in its entirety in the Appendix at E1 through E19. Finally, the United States Department of Labor (DOL) has promulgated 29 CFR § 553.31(a), a regulation interpreting 29 USC §

207(p)(3). This regulation is set forth in its entirety in the Appendix at F1 through F2.

STATEMENT OF THE CASE

A. Procedural history

On July 6, 2004, the Respondent firefighters filed and served their Complaint pursuant to 29 USC § 216(b), alleging the City of Aberdeen violated the overtime provisions of 29 USC § 207. Petitioner City of Aberdeen answered on July 26, 2004.

After limited discovery, the parties agreed to submit the issue of liability to the court on stipulated facts. The United States District Court for the District of South Dakota ordered bifurcation of the issues of liability and damages and the parties filed their stipulated facts on April 22, 2005. The parties then filed cross motions for summary judgment.

On September 16, 2005, the District Court issued its Memorandum Opinion and Order, concluding that the plain language of the statute precludes overtime pay for both the substituting employee and the employee who does not work. The District Court denied the firefighters' motion for partial summary judgment and granted City's motion for summary judgment. Judgment for City was entered on September 16, 2005. The firefighters filed timely notice of appeal on October 6, 2005.

On September 29, 2006, the United States Court of Appeals for the Eighth Circuit issued its Memorandum Opinion and Order, reversing the district court and concluding that the FLSA contained a statutory gap that the DOL was free to fill. Petitioner timely filed a petition for rehearing en banc, which was denied on November 8, 2006. This petition for writ of certiorari followed.

B. Statement of Facts

The parties submitted this case on a set of stipulated facts filed with the district court on April 22, 2005. *See* App. G1-G3.

Respondent firefighters are employees or former employees of Petitioner City of Aberdeen, South Dakota. While working for the City, the firefighters were scheduled to work hours in excess of the hourly limits prescribed in 29 USC § 207. When the firefighters actually worked their scheduled shifts, they were paid time and a half for any hours worked in excess of the FLSA limits.

However, as part of an approved substitute arrangement, the firefighters were allowed to voluntarily trade shifts with co-workers. When the firefighters elected to have a substitute work their overtime shift, the firefighters were paid only straight time for their scheduled hours, which were actually performed by the substitute. The firefighters were also credited with all hours worked by the substitute for purposes of accruing paid leave, seniority and benefits, as if the firefighters themselves had actually worked the shift.

Consistent with the FLSA requirements in 29 USC § 207(p)(3), the substitute was not credited with any traded hours he or she worked. Nor was the substitute paid by the City for this traded time. Pay-back, in whatever form and if it was made at all, was solely the responsibility of the trading employees.

REASONS FOR GRANTING THE WRIT

The FLSA guarantees overtime wages to employees who work hours in excess of the prescribed limits. Pursuant to 29 USC § 207(a), this overtime eligibility is limited to employees who actually work the excess hours. But 29 USC § 207(p)(3) provides an exclusion to this eligibility for traded hours. Under a substitution scenario, "the hours such employee worked as a substitute shall be excluded by the

public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section." 29 USC § 207(p)(3). Thus, while working employees are normally entitled to time and a half wages for all hours they work in excess of the FLSA limits, a substituting employee is excluded from this overtime eligibility.

This case turns on the treatment of work performed pursuant to a substitute arrangement. As a privilege to its employee firefighters, City allows them to trade shifts with their co-workers in order to facilitate extra time off at their convenience. The firefighters concede that the substitutes are not entitled to overtime wages for traded hours they worked. But the firefighters contend that the originally scheduled non-working firefighter should still be paid the extra half-time premium for overtime hours actually performed by the substitute.

Under the *Chevron* doctrine, the questions presented to the appellate court were: (1) whether Congress was either ambiguous or silent on the issue of paying overtime to the non-working employee; and if so (2) whether the DOL's interpretation allowing such payment is reasonable and permissible. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 US 837, 842-43, 104 SCt 2778, 2781-82 (1984).

In a 2 to 1 decision, the appellate court answered the question of ambiguity by holding, contrary to established United States Supreme Court precedent, that 29 USC § 207(a) does not apply to firefighters, but even if it did apply, it does not require "actual work" by the claiming employee to trigger his or her overtime eligibility. Next, the appellate court noted that because there is no provision for the non-working employee in 29 USC § 207(p)(3), Congress left a statutory gap that the DOL was free to fill. Most importantly, the appellate court's decision abrogating the actual work requirement may not be limited in application to firefighters and the City, but instead may be expanded to apply to all public employment.

For the following reasons, the City believes this Court should grant certiorari to decide these questions of exceptional importance.

I. SECTION 207(a) OF THE FLSA APPLIES TO ALL WORKING PUBLIC EMPLOYEES.

"The FLSA was designed to give specific minimum protections to individual workers and to ensure that *each* employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of 'overwork' as well as 'underpay'.'" *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 US 728, 739, 101 SCt 1437, 1444 (1981) (quoting *Overnight Motor Trans. Co. v. Missel*, 316 US 572, 578, 62 SCt 1216, 1220 (1942)) (additional citations omitted) (emphasis in original). In 1974, the FLSA's protection was extended to all public employees, including those employed by local governments. 29 USC § 203(d) and (x). Congress, however, recognized that public safety professionals, such as law enforcement officers and firefighters, rarely work a straight 40-hour week. To lessen the potential burden that § 207(a) would have on public employers, Congress enacted 29 USC § 207(k) to provide a partial exemption by expanding the hourly limits for employees in these professions.

A. Section 207(k) incorporates § 207(a).

The appellate court stated "[w]e question, moreover, the applicability of § 207(a) to these current and former firefighters." *Senger*, 466 F3d at 673. Instead, the appellate court held that § 207(k) was the appropriate provision to govern the firefighters' overtime pay. This decision contradicts the language of the statute itself.

While purporting to consider Congress's intent in adopting the 1975 amendments, the appellate court failed to recognize that the newly-added provisions actually

incorporate the old. Indeed, § 207(k) provides, "No public agency shall be deemed to have violated *subsection (a) of this section* with respect to the employment of any employee in fire protection activities . . . ." (emphasis added).

Congressional intent is derived first and foremost, from the plain language of the particular statute, as well as the language of the Act as a whole. *Kmart Corp. v. Cartier, Inc.*, 486 US 281, 291-92, 108 SCt 1811, 1817-18 (1988). While the 1974 amendments to the FLSA added coverage for firefighters, they did not alter the impetus of the rest of the statute.

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard v. Pons, 434 US 575, 581, 98 SCt 866, 870 (1978) (citations omitted).

In other words, § 207(k) may present special exceptions for the newly added firefighters, but that section did not eliminate the application of the general rule set forth in § 207(a). The language of § 207(a) provides the rule, while § 207(k) merely modifies the hourly limits for firefighters. To say that § 207(a) does not apply to firefighters ignores the very language the court purported to use in support of its decision.[1]

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[1] Even if this Court were to agree with the appellate court's rationale, the nonworking firefighters can no more be deemed to be "engaged in fire protection activities" than they can be deemed to be "engaged in commerce or the production of goods for commerce." 29 USC § 207(a), (k). When a substitute works the shift, the originally scheduled employee is "engaged" in nothing more than his or her own pursuits. *Armour v. Wantock*, 323 US 126, 133, 65 SCt 165, 168 (1944).

B. Courts have consistently held that § 207(a) is the general rule defining overtime eligibility for all working public employees.

The appellate court's holding conflicts with case law from other circuit courts of appeals, including its own.

For example, in *Acton v. City of Columbia*, the Eighth Circuit Court of Appeals was faced with the question of whether money paid to firefighters as sick leave buy-back should be included in the regular rate of pay for FLSA purposes. 436 F3d 969, 975 (8thCir 2006). There, the court applied 29 USC § 207(a) to firefighters and noted, "[t]he regular rate of pay calculation is critical because it provides the base point from which the firefighters' overtime compensation is calculated." *Id.* (citing 29 USC § 207(a)(1)). The court went on to conclude that sick leave buy-back should be included in regular rate of pay for FLSA purposes because it is "awarded to employees for coming to work consistently, not for work that was never performed." *Id.* at n10, 979.

Similarly, in *Zumerling v. Devine*, several firefighters alleged various violations of the FLSA. 769 F2d 745, 746-47 (FedCir 1985). In particular, the firefighters alleged an equal protection violation based on the use of § 207(k) rather than § 207(a) as the basis for calculating their regular rate of pay. *Id.* at 751. After concluding that the OPM's computation was correct, including the application of § 207(e)'s exclusions as applicable to all employees, the court dismissed this argument. Instead, it held "[t]he general formula for the regular rate applies equally to all these employees. The different calculations based on this formula merely reflect the employees' different work schedules and compensations." *Id.*

Many other courts have addressed the application of § 207(a) to firefighters in the context of whether the employer

was entitled to § 207(k)'s partial exemption.[2] These cases have consistently held that § 207(a) provides the general rule applicable to all employees under the Act, while § 207(k) merely modifies the measurable work period for firefighters. Accordingly, this Court should grant certiorari to resolve this conflict with both the language of the statute as well as other appellate court precedent.

II. THE FLSA REQUIRES THE EMPLOYEE CLAIMING THE OVERTIME TO ACTUALLY WORK THE EXCESS HOURS.

"The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *U.S. v. Ron Pair Enters., Inc.*, 489 US 235, 241 109 SCt 1026, 1030 (1989); *Chevron*, 467 US at 842-43, 104 SCt at 2781-82. Congressional intent is gleaned first and foremost from the plain language Congress chose in drafting the law. *North Dakota v. U.S.*, 460 US 300, 312-13, 103 SCt 1095, 1102-03 (1983). This Court has described this rule as the "one, cardinal canon before all others." *Connecticut Nat'l Bank v. Germain*, 503 US 249, 253, 112 SCt 1146, 1149 (1992). Thus, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last:

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[2] *See, e.g., McGavock v. City of Water Valley*, 452 F3d 423, 424-25 (5thCir 2006) (recognizing § 207(a) provides the rule while § 207(k) provides a partial exemption for firefighters' hours); *Fulmer v. City of Albans, WV*, 125 FedAppx 459, 460-61 (4thCir 2005) (applying § 207(a)(1) to firefighters); *Singer v. City of Waco, Texas*, 324 F3d 813, 818 (5thCir 2003) (noting § 207(a) requires employer to pay overtime while § 207(k) gives partial exemption for employers of firefighters); *West v. Anne Arundel County, Md.*, 137 F3d 752, 760 (4thCir 1998) (noting § 207(a) defines overtime rate of pay while § 207(k) defines hourly limits for firefighters); *Justice v. Metro. Gov't of Nashville, Davidson County*, 4 F3d 1387, 1392 (6thCir 1993) (noting § 207(a) provides overtime for municipal employees, while § 207(k) provides a partial exemption for firefighters).

'judicial inquiry is complete'." *Id.* at 253-54 (citations omitted).

Both parties agree that § 207(p)(3) clearly excludes overtime for substituted hours that the employer would potentially have been required to pay *to the substitute* before the FLSA was amended.[3] *Senger*, 466 F3d at 672. Nevertheless, the firefighters argued that the City should still have to pay overtime to *someone*, even if it is to the nonworking employee, because the City reaps the benefit of the extra hours of work. The appellate court agreed with this rationale, holding that there is "no indication in § 207(k) that all of those hours must be worked by the employee him- or herself . . . ."[4] *Id.* at 673.

This Court should grant certiorari on this issue for two reasons. First, the appellate court's decision conflicts with this Court's precedent interpreting the FLSA's actual work requirement. Second, the appellate court's decision conflicts with other appellate court precedent interpreting the FLSA to exclude from overtime eligibility those paid hours not actually worked by the claiming employee. Moreover,

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[3] Trading time was a well-established practice and Congress was concerned that the employer would have to pay the substitute overtime, even though the substitute was voluntarily picking up the extra hours. To prevent this added burden on public employers, and to continue encouraging employers to allow the trading, Congress changed the law to exclude traded time from overtime calculations. 29 USC § 207(p)(3).

[4] The appellate court held that the DOL filled a "statutory gap" by promulgating 29 CFR § 553.31(a), which states "[w]here one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift." It is interesting to note, however, that if Congress had truly intended this "exchangeable employee" theory, it would never have needed to enact 29 USC § 207(p)(3); the trade would essentially have been ignored. Thus, the appellate court's holding impermissibly allows a DOL regulation to render 29 USC § 207(p)(3) superfluous. *Freytag v. Commissioner*, 501 US 868, 877, 111 SCt 2631, 2638 (1991) (expressing "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.")

the decision is of exceptional importance because, contrary to congressional intent, it burdens all public employers.

A. The FLSA guarantees overtime wages to overworked employees, not overscheduled employees.

Congress was neither silent nor ambiguous on the issue of whether the non-working employee could claim overtime pay. 29 USC § 207(a) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek *is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,* for a workweek longer than forty hours. (emphasis added).

See also 29 USC § 203(s)(1) (defining "enterprise engaged in commerce".) "The purpose [of § 207(a)] was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost." *Bay Ridge Operating Co. v. Aaron*, 334 US 446, 459-60, 68 SCt 1186, 1194 (1948) (citations omitted). There is no mention of employees being entitled to overtime for merely being *scheduled* to work.

Despite this express language, the appellate court reasoned that the FLSA's legislative history supports the DOL's interpretation of § 207(p)(3), allowing a nonworking employee to demand overtime for hours worked by another. 29 CFR §553.31(a).[5] Essentially, this bootstrapping[6]

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[5] 29 CFR § 553.31(a) provides "[w]here one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift." The DOL interpreted the word

rationale allows an agency interpretation to "override the clearly expressed legislative intent contained in section 207(a)." *Senger*, 466 F3d at 676 (Beam, J., dissenting).

1. This Court has consistently held that an employee engaged in his own pursuits is not eligible for overtime.

The rule is, and always has been, that the employee claiming compensation must actually work the excess hours to be eligible for overtime pay. *IBP, Inc. v. Alvarez*, 546 US 21, 126 SCt 514, 519 (2005) (tracing history of this Court's interpretation of overtime eligible work). Of course, what constitutes "work" has often been challenged, but this Court has consistently held that an employee is not entitled to overtime when he is engaged in his own pursuits and not those of his employer.

For example, in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, this Court addressed the issue of whether iron ore miners' time spent gathering tools and traveling down the shaft to the work face, and back again at the end of their shift, was included in overtime eligible hours. 321 US 590, 595-96, 64 SCt 698, 701-03 (1944). There, this Court concluded that § 207(a) represents "Congressional intention to guarantee either regular or overtime compensation for all actual work or employment." *Id.* at 597, 64 SCt at 703. This Court reasoned:

> We cannot assume that Congress here was referring to work or employment other than as those words are commonly used – as meaning physical or mental exertion (whether

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"credited" in this regulation to mean "paid," and the appellate court afforded *Chevron* deference to the interpretation. *Senger*, 466 F3d at 674.

[6] Just as the absence of ambiguity prevents the DOL from promulgating interpretative regulations, so, too, does the absence of ambiguity prevent a court from considering legislative history in a case of statutory interpretation. *Conn. Nat'l Bank*, 503 US at 253-54, 112 SCt at 1149.

> burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.

Id. at 598, 64 SCt at 703. This Court also noted that the activity in question was "not primarily for the convenience of the miners and bears no relation whatever to their needs . . .," thus indicating that the result would have been different had the activity served the convenience or needs of the employee, as in the case at bar. *Id.* at 599, 64 SCt at 703.[7]

Likewise, in *Armour,* this Court examined whether time employees spent at a soap factory on call as fire guards was overtime eligible, given that the employees were not engaged in any specific task. 323 US at 127, 65 SCt at 165-66. This Court noted "[r]eadiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Id.* at 133, 65 SCt at 168. But the paramount inquiry is "[w]hether time is spent predominately for the employer's benefit or for the employee's . . . ." *Id.* Thus, this Court concluded, "[t]he overtime provisions of the Act, . . . 29 USC § 207, apply only to those who are 'employees' and to 'employment' in excess of the specified hours . . . ." *Id.* at 132.

Congress's concern over the flood of litigation that followed *Tennessee Coal* resulted in the Portal to Portal Pay Act. *See* 29 USC §§ 251-262. In its policy declaration, Congress found that this Court's interpretation of FLSA "work" added unintended liability for employers, which resulted in a substantial burden on commerce. 29 USC § 251. More specifically, Congress was worried that "employees would receive windfall payments, including

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[7] *See also Jewell Ridge v. Coal Corp.*, 325 US 161, 167, 65 SCt 1063, 1067 (1945) (quoting *Tennessee Coal, supra* and holding that § 207(a) "necessitates that the workweek be computed on the basis of the hours spent in actual work and that compensation be paid accordingly.").

liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay . . . ." 29 USC § 251(a)(4). Accordingly, Congress further limited overtime eligible hours to those actually worked, as opposed to time spent in transit to and from the job site. *See* 29 USC § 252-254.

This Court responded to Congress's changes in the FLSA by carving out an exception for preliminary and postliminary activities that "are an integral and indispensable part of the principal activities . . . ." *Steiner v. Mitchell*, 350 US 247, 249, 76 SCt 330, 331-32 (1956). Nevertheless, this Court's primary benefit test, as established in *Tennessee Coal*, "has withstood the test of time and constitutes the yardstick by which claims under the FLSA are measured." *Plumley v. Southern Container, Inc.*, 303 F3d 364, 371 n4 (2002) (setting forth various appellate court decisions applying test); *Reich v. S. New England Telecomms. Corp.*, 121 F3d 58, 64-65 (2dCir 1997) ("In our view, this 'predominant benefit' standard 'sensibly integrates developing case law with the regulations' language and purpose,' and more importantly, with the language of the FLSA itself.") (citation omitted).

The appellate court's decision in the case at bar conflicts with this precedent. An employee that takes leave, albeit privately arranged by engaging his own substitute, does not work for the employer; instead, he uses the time to engage in his own pursuits. *See, e.g. Avery v. City of Talladega,* 24 F3d 1337, 1347 (11thCir 1994)(holding officers' lunch breaks not overtime eligible when they were allowed to leave work stations to tend to personal matters); *Owens v. Local No. 169*, 971 F2d 347, 355 (9thCir 1992) (applying primary benefit test to find that employees were not entitled to overtime for hours they were on call because they remained free to engage in personal activities). Never has this Court, or any other that Petitioner could find, held an employer liable for overtime hours that were scheduled, but not worked, by that employee claiming the extra wages.

2. Other courts have consistently held the FLSA precludes overtime for excess hours paid to but not worked by the scheduled employee.

Paying overtime wages to a nonworking scheduled employee is like paying overtime to an employee who takes paid vacation, holiday or sick leave rather that actually working the scheduled excess shift. *See Joseph G. Moretti, Inc. v. Boogers*, 376 F2d 27, 28 (5thCir 1967). Regardless of whether the substitute is arranged by the employer (in the case of sick leave) or the employee (by voluntary substitution), the traded hours are not overtime eligible when they are not actually worked by the employee claiming the extra wages.

For example, when an employee takes paid vacation leave on a shift that would otherwise have resulted in overtime, he or she is paid only straight time and the employer calls another employee to come work the shift. 29 USC § 207(e)(2). While the employer still receives the benefit of the extra hours of work, Congress specifically provided that overtime eligible hours "shall not be deemed to include . . . payments made for occasional periods when no work is performed due to vacation, holiday, illness, . . . and other similar payments made to an employee which are not made as compensation *for his hours of employment*." *Id.* (emphasis added); *Acton*, 436 F3d at 977 (distinguishing sick leave buy-back from excluded on-call pay, as the former is "awarded to employees for coming to work consistently," while the latter is "for work never performed."). Likewise, when an employee voluntarily arranges for his overtime shift to be worked by a substitute, the nonworking employee is paid for the substitute's work and not "as compensation for his [own] hours of employment." 29 USC § 207(e)(2); *see, e.g., Featsent v. City of Youngstown*, 70 F3d 900, 905 (6thCir 1995) (excluding from regular rate of pay bonuses for

unused sick leave as "similar to payments made when no work is performed due to illness").

In *Lanehart v. Horner*, the United States Court of Appeals for the Federal Circuit recognized that FLSA overtime compensation is reduced when federal firefighters take paid sick leave, but ruled that it is recouped under the "leave with pay" provisions of Title 5. 818 F2d 1574, 1582 (FedCir 1987). Unlike the firefighters in *Lanehart,* however, the firefighters in the case at bar are not placed in any leave status when they personally arrange for a substitute, nor is any leave docked from their accounts. *See Armitage v. U.S.*, 23 ClCt 483, 488-89 (1991) (distinguishing *Lanehart* on these facts). Instead, "[t]heir attendance was excused and they simply did not work." *Id.* By this rationale, the firefighters here should not be entitled to overtime wages when they did not perform the work.

In *Local 889, American Federation of State, County and Municipal Employees v. Louisiana*, the court was asked to decide whether the employer was violating the FLSA by requiring its employees to use comp time before using annual leave. 145 F3d 280, 284 (5thCir 1998). The employees contended they had a property right in their banked comp time, entitling them to use annual leave first and force the employer to pay cash overtime once the banked comp time reached a certain level. *Id.* (citing 29 USC § 207(o)(3)). The court, however, declined to adopt this interpretation because it would "practically nullify the purpose of the statutory scheme." *Id.* at 286 (quoting *AFSCME v. Louisiana*, No 90-4389 (EDLa 1996)). Instead, the court held that "[i]f the employee wishes to be paid cash overtime, the employee need not take any time off." *Id.*

By ruling as it did, the appellate court has changed the statute's meaning, contravened congressional intent, and discarded over 60 years of United States Supreme Court precedent. Indeed, this principle that the excess hours must be actually worked by the employee claiming the overtime is set forth by the DOL in the Code of Federal Regulations no

less than 61 times.[8] In light of all of this, it makes no sense to rule that an employer should be liable for overtime to an employee who does not actually work the excess hours.

Where an agency's interpretation is inconsistent with the plain language of a statute, the interpretation is improper and no deference is due. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 US 86, 109-10, 114 SCt 517, 531 (1993) (noting "Department ha[d] exceeded the scope of available ambiguity."). The non-working employee was intentionally not included in FLSA coverage because he was never in danger of being involuntarily overworked. While the working employee is covered, Congress specifically excluded his traded hours from overtime calculations because the trade is undertaken voluntarily and solely for the trading employees' convenience. *See* 29 USC § 207(p)(3); *Tennessee Coal*, 321 US at 599, 64 SCt at 703. This principle was not changed by either the 1975 Amendments or the 1985 Amendments and it applies as much to firefighters as it does to all other employees governed by the Act.

B. The decision impermissibly burdens public employers.

Congress intended to encourage employers to continue allowing their employees to trade shifts. For example, 29 USC § 211(c) relieves employers from having to keep records of shift-trading or substitutions. This removed the burden on the employer of monitoring the trades to ensure each employee is "paid back" with a reciprocal shift. But the appellate court's decision in this case reestablishes the very bookkeeping that Congress sought to avoid.

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[8] *See, e.g.*, 29 CFR §531.60(a) (overtime for tipped employees calculated by "hours actually worked"); 29 CFR § 553.22(b) ("hours of actual overtime worked); 5 CFR §550.111(f)(1) ("overtime work means actual work"); 5 CFR § 550.112(e) ("period is counted as overtime work only when the employee actually performs work").

For example, assume Frank Firefighter is paid overtime in this *Garcia* pay period for work completed by Sam Substitute, but the reciprocal swap does not occur until the next *Garcia* pay period (if at all). In such a scenario, the employer would be in violation of 29 CFR § 778.106 because the overtime would be paid to the earning employee outside the pay period in which it was worked (i.e. Frank would be paid too early, and Sam too late). Thus, the employer is forced to track the trade to ensure that a reciprocal shift is worked within the same pay period.

Another example of the burden to employers is apparent in scheduling and expenditures, particularly with public safety personnel. An employer may over-schedule each particular shift to ensure a full staff, knowing that there will always be employees requesting time off or calling in sick. This does not necessarily indicate an employer's expectation to pay overtime for these scheduled hours. *See* 29 USC 207 § (e)(2). Yet, the appellate court's ruling would increase the employer's expenditures by guaranteeing all scheduled overtime, contrary to the employment contract. "Public employers, unlike their private sector counterparts, do not have the luxury of being able to pass along overtime pay to the consumer." *Local 889, Am. Fed. of State, County, and Mun. Employees*, 145 F3d 280, 285 (5thCir 1998). Nevertheless, the appellate court's opinion encourages employees to bank their earned leave and use trade-time, which contravenes the purpose of the 1985 amendment to the FLSA. *Id.*

The appellate court's ruling will also burden employers by adversely affecting shift composition and work distribution, with great potential for abuse. The ruling encourages senior employees to trade off overtime hours, pay straight time pay to the subordinate substitute, and pocket the overtime premium without ever having worked the shift. Without significant oversight, this would leave the employer paying a premium rate for work from a less experienced employee without furthering the objectives of the FLSA.

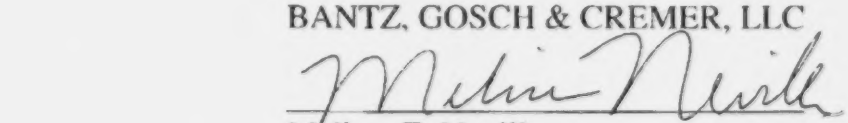
The appellate court's decision leaves only two options for employers: shoulder the burden of bookkeeping or disallow the trading, both of which Congress sought to prevent.

CONCLUSION

The DOL's regulation at 29 CFR § 553.31(a) is not an interpretation of the FLSA; it is the creation of a new law altogether. Never has Congress, nor any court that Petitioner could find, held a public agency liable to pay time and a half wages to an employee who never actually performed the work. By dangerously expanding the definition of what work may be deemed overtime eligible, the appellate court's decision directly conflicts with established United States Supreme Court precedent, as well as precedent from the majority of other circuit courts of appeals – even its own. For all of these reasons, Petitioner City of Aberdeen believes that the appellate court overlooked or misapprehended the foregoing significant points of law and it respectfully requests this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Dated this 2 day of February, 2007.

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3803

Rob Senger; Mike Eliason; Jeff Fiferlick; Mario Gourde; Austin Hearnen; Rob Johnson; Brooks Kleffman; Tim A. Medenwald; Keith A. Sharisky,	*	
Appellants,	*	
v.	*	Appeal from the United States District Court for the District of South Dakota.
City of Aberdeen, South Dakota,	*	
Appellee.	*	
United States Department of Labor,	*	
Amicus Curiae.	*	

Submitted: June 15, 2006
Filed: September 29, 2006

Before ARNOLD and BEAM, Circuit Judges, and DOTY,[1] District Judge.

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota, sitting by designation.

ARNOLD, Circuit Judge.

The plaintiffs are current and former firefighters for the City of Aberdeen, South Dakota, who have sued the City to recover overtime pay that they claim is due them under the Fair Labor Standards Act (FLSA). Both sides agreed that no facts were in dispute and moved for summary judgment. The district court denied the plaintiffs' motion for partial summary judgment but granted judgment to the City, concluding that the FLSA's plain language prevents the payment of overtime wages to those who have not actually worked. We review the district court's grant of a motion for summary judgment *de novo*. *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005). Because the relevant facts are not in dispute and the judgment is final, we also review the court's denial of the plaintiff's motion for partial summary judgment *de novo*. *See White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1190 (8th Cir. 1999). After careful consideration, we reverse.

The plaintiffs were often scheduled to work more hours than the FLSA permits an employee to work without receiving overtime pay, and on some of those occasions the plaintiffs would ask other employees to work shifts on their behalf. This kind of arrangement is common among firefighters and is permissible under the FLSA so long as it is voluntary and done with the employer's permission. 29 U.S.C. § 207(p)(3). When a substitution occurs, the employer pays the scheduled employee and not the substitute; the amount that the substitute receives is fixed by private agreement between the two employees. The City paid the plaintiffs straight time for their substituted shifts and also credited them for the purposes of seniority and leave time, but it refused to pay them the overtime to which the FLSA plainly would have entitled them had they worked the shifts themselves. The plaintiffs contend that a federal regulation entitled them to the same amount of overtime pay when substitutes worked their shifts for them.

When a public employee works a shift for another employee, the law provides that "the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section." 29 U.S.C. § 207(p)(3). A brief example may help:
Imagine two employees who are each scheduled to work 44 hours one week. Employee A works thirty-six hours and asks employee B to work the last eight-hour shift on her behalf. Employee B agrees and works the shift. Even though employee B worked fifty-two hours that week, he is paid for only forty-four hours and receives only four hours of overtime pay. (As we have said, the compensation that employee B receives for the additional eight hours is determined by agreement between employees A and B.)

The parties concede this but disagree on whether the employer in our example has to pay four hours of overtime pay to employee A. The Department of Labor has promulgated a regulation stating that when one employee substitutes for another the hours worked are "excluded" from the hours "for which the substituting employee would otherwise be entitled to overtime compensation," and "each employee will be credited as if he or she had worked his or her normal work schedule for that shift." 29 C.F.R. § 553.31(a). The plaintiffs read this regulation as requiring the City to pay overtime wages to the scheduled employee. The City contends that the regulation is void because a statute governing overtime, 29 U.S.C. § 207(a)(1), requires that a person actually work more than the statutory maximum number of hours to receive overtime pay.

When reviewing an agency's construction of a statute, we look first to whether the statute's language and legislative history clearly demonstrate what Congress intended. *North Dakota ex rel. Olson v. Centers for Medicare & Medicaid Servs.*, 403 F.3d 537, 539 (8th Cir. 2005). When they do, that intent controls and a court will not to defer to any regulation that interprets the statute in a contrary manner. *Id*;

see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 845 (1984). But when Congress's intent is unclear and the statute contains an explicit or implicit gap, we will defer to the agency's regulation so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844; *Friends of the Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 821-22 (8th Cir. 2006).

In support of its plain-language argument, the City cites to language in the FLSA that says "no employer shall employ any of his employees who in any workweek is *engaged* in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives [overtime wages]." 29 U.S.C. § 207(a)(1) (emphasis added). This language, the City says, means that the employee must be engaged (i.e, actively working) to receive overtime wages. But a more careful parsing of the section reveals that the statute uses the phrase "engaged in commerce" as a kind of applicational threshold: The overtime provisions of § 207(a) apply if the employee is engaged in commerce or in the production of goods for commerce at any time during the work week. And even if the employee is not engaged in commerce or in the production of goods for commerce, § 207(a) applies if the "enterprise" for which he or she works is so engaged. *Id.* The word "engaged" therefore relates not to whether the employee was actively working, but whether the employee's or enterprise's work was of a certain kind.

We question, moreover, the applicability of § 207(a) to these current and former firefighters. Congress amended the FLSA in 1974 so that its provisions would apply to state and local employees. In the course of passing those amendments, the House and Senate agreed to a partial exemption to the overtime rules for firefighters and police officers. Section 207(k) of the FLSA reflects that

compromise. Under that provision, state and local employers of firefighters are not bound to the seven-day work period in 207(a), but may instead extend the relevant work period to as long as 28 days. 29 U.S.C. § 207(k). In addition, an employer must pay overtime wages only if a firefighter's total "tours of duty" exceed 212 hours in a 28-day work period; for shorter work periods, the ratio of 212 to 28 is used to compute how many hours must be in a firefighter's total "tours of duty" before he or she is entitled to overtime pay. *Id.*; 29 C.F.R. § 553.230(c). We see no indication in § 207(k) that all of those hours must be worked by the employee him- or herself. We therefore conclude that the FLSA's plain language does not reveal a Congressional intent to deny an employee overtime wages when another worker voluntarily substitutes for him or her with the employer's permission.

Examining the legislative history surrounding § 207(p)(3) helps clarify matters. This provision was part of the 1985 FLSA amendments, *see* Fair Labor Standards Amendments of 1985, PL 99-150 §3(a), 99 Stat. 787 (November 13, 1985), and both the House and Senate Reports regarding those amendments note that employees engaged in fire-protection or law-enforcement activities traditionally traded shifts with one another without the substitution affecting the computation of overtime for either employee. H.R. Rep. No. 99-331, at 25 (1985); S. Rep. No. 99-159, at 13 (1985). The concern arose that without § 207(p)(3), certain FLSA regulations could require the state or local government to pay overtime to the substitute employee. Consider our earlier example, assuming that § 207(p)(3) did not exist. Employee B still works eight hours on behalf of employee A: If the FLSA requires the employer to pay employee B overtime for all the hours that he or she works above the statutory maximum, the employer would have to pay employee B twelve hours of overtime rather than four. Such a rule would leave the employer unable to control its overtime expenditures, since the employees' voluntary substitutions could cause some employees to accrue massive

amounts of overtime. The only way that the employer could cabin these costs would be to forbid voluntary substitutions altogether, which would deprive both employers and employees of a useful and flexible tool.

Addressing this concern, both the House and Senate Reports explain that under the new subsection (§ 207(p)(3)), "[i]f two employees trade hours ... , each employee will be credited as if he or she had worked his or her normal work schedule." H.R. Rep. No. 99-331, at 25 (1985); S. Rep. No. 99-150, at 13 (1985). This is a clear indication that the purpose of § 207(p)(3) was to fashion a way to allow voluntary substitutions without having overtime costs spiral out of control. By having the employer credit each employee for the shift to which he or she was scheduled, the subsection limits the amount that an employer will have to pay in overtime wages to no more than what it would have paid absent the voluntary shift substitutions. The Department of Labor used exactly the same language when it promulgated § 553.31(a). The regulation as written is therefore fully consistent with the clearly expressed intent of Congress.

Even though the regulation as written is plainly consistent with Congress's intent, we are still left with a question: What precisely does the regulation mean when it says that each employee will be "credited"? The City contends that the word "credited" requires it to give the scheduled employee only normal wages for the shift along with any attendant benefits that he or she would have accrued. The plaintiffs, on the other hand, argue that it means that the employer must treat the scheduled employee in all respects as if he or she had worked the shift, including paying him or her overtime wages if otherwise warranted. These arguments demonstrate that the term is susceptible to two different interpretations; in other words, the regulation is ambiguous on the question. The Department of Labor has consistently interpreted the regulation to mean that "the employee scheduled to work receives credit (and compensation) as if he or she had worked." Application of

the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012, 2018 (Jan. 16, 1987); *see also* Wage and Hour Opinion Letter, 2004 WL 3177870 (Nov. 23, 2004). The Department of Labor's amicus brief in this case has reiterated that position. An agency's interpretation of its own ambiguous regulation will stand so long as it is not "'plainly erroneous or inconsistent with the regulation.'" *Rain & Hail Ins. Serv. v. Federal Crop Ins. Corp.*, 426 F.3d 976, 979 (8th Cir. 2005) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quotation marks and citations omitted). The agency's interpretation in this case easily passes that test.

We do not see much merit in the City's argument that the Department of Labor's interpretation of § 553.31(a) creates an unreasonable burden on employers. All the City has to do is pay the scheduled employee as if he or she had worked the scheduled shift; it need not keep any additional records. And the City need not monitor all shift exchanges, because any voluntary substitutions that take place will not cause the employer's actual overtime expenditures to vary from the expectations that it developed when it first scheduled the employees.

For the foregoing reasons, we reverse both the grant of the defendant's motion for summary judgment and the denial of the plaintiffs' motion for partial summary judgment, and we remand the case for further proceedings not inconsistent with this opinion.

BEAM, Circuit Judge, dissenting.

I believe the City of Aberdeen has correctly construed and applied the applicable statutes. Accordingly, I respectfully dissent.

Like the district court, I think the language adopted by Congress in 29 U.S.C. § 207(a) as part of the Fair Labor Standards Act (FLSA) controls the practices involved in this litigation and requires an employee to actively work to

receive an overtime rate of compensation. The statute says "no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours unless such employee receives [overtime wages]." 29 U.S.C. § 207(a)(1).[2] The words "shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce" for a period of time beyond an FLSA-designated workweek embrace the overarching and continuing overtime-pay focus of the Act, that is, that overtime compensation is only due for actual working time beyond the non-overtime pay periods established by the statute. While 1974 amendments (that added coverage of state and local employees and congressional recognition that a "forty hour workweek" frequently does not suffice for the employment of firefighters and similarly situated public employees) slightly altered the thrust of the Act, see id. § 207(k), no modifications were made to the above-referenced "employee . . . engaged in" language and nothing in the amendment attenuates or alters the purpose and intent of section 207(a).

Amendments to the FLSA in 1985 validated an already established practice of substitution of services for scheduled work hours. In this regard Congress said:

> If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same

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[2] While the words "engaged in commerce" standing alone might well be construed as requiring only a general employment in commerce, the additional words "in any workweek" clearly lead to the more precise intent I find.

> capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

Id. § 207(p)(3). While this language clearly excludes overtime pay for substituted services, it says nothing about to whom or by whom regular time compensation will be paid for the substituted hours. But, as noted above, the statute is unambiguous in commanding that these substitute hours "shall be excluded . . . in the calculation of the hours for which the [substituting] employee is entitled to overtime compensation."

Then, enters the Department of Labor (DOL) with a regulation on substitution. The agency essentially repeats the section 207(p)(3) statutory language and adds "[w]here one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift." 29 C.F.R. § 553.31(a) (third sentence). The remainder of section 553.31 otherwise takes the public employer out of the compensation arrangements between the substituted-for employee and the substituting employee, matters not directly at issue in this appeal.

DOL contends that sentence three "mandates the payment of overtime compensation to the substituted-for firefights in this case." Amicus brief at 8. Plaintiffs and the court, applying Chevron deference to DOL's regulatory gloss, agree that the crediting arrangement in section 553.31(a) is responsive to an ambiguously expressed statutory intent to require the public employer to pay overtime compensation to the nonworking, substituted-for employee. I disagree with this analysis.

The statutory amendments referred to by the court and the subsequent regulatory edicts from DOL simply cannot override the clearly expressed legislative intent contained in section 207(a). The section states that to require an employer to pay overtime compensation a substituted-for employee

must actually work overtime eligible hours. Thus, DOL's overtime-oriented slant on the statute cannot command deference from this court because the regulation is "plainly erroneous or inconsistent with [section 207(a)]." Auer v. Robbins, 519 U.S. 452, 461 (1997) (quotations omitted). Section 553.31(a) (third sentence) simply attempts to rewrite the language of the Act on this point. And in doing so, DOL ignores established Supreme Court precedent. In Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944),[3] the Supreme Court analyzed this portion of the legislative language in section 207(a). The Court noted that the Act "defines the word 'employ' to include 'to suffer or permit to work.'" 321 U.S. at 597. Then, applying this definition, the Court stated that the language of section 207(a) is "necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all *actual* work or employment." Id. at 597-98 (emphasis added). Thus, DOL's attempted regulatory imprint on the unambiguous language of section 207(a) is improper. The City and the district court were correct. Indeed, at the bottom line, I believe that under the Tennessee Coal holding there is no enforceable FLSA-based requirement that a public agency pay anyone anything for not working, but this is perhaps an issue for another day.

Accordingly, I respectfully dissent.

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[3] In response to judicial interpretation of the FLSA, Congress passed the 1947 Portal-to-Portal Pay Act, codified as 29 U.S.C. §§ 251-262, which, among other things, even more narrowly defined compensable activities. See 29 U.S.C. § 254.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

ROB SENGER; MIKE ELIASON; JEFF FIFERLICK; MARIO GOURDE; AUSTIN HEARNEN; ROB JOHNSON; BROOKS KLEFFMAN; TIM A. MEDENWALD; KEITH A. SHARISKY,	)	CIV. 04-1014-RHB
PLAINTIFF,	)	MEMORANDUM OPINION AND ORDER
VS.	)	
CITY OF ABERDEEN, SOUTH DAKOTA,	)	
DEFENDANT.	)	

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I. Introduction

Plaintiffs filed a complaint against defendant claiming that defendant had violated the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 201 et seq., for failing and refusing to provide plaintiffs with overtime compensation. This matter is before the Court on plaintiffs' motion for partial summary judgment as to liability, as well as on defendant's

cross motion for summary judgment. The Court has jurisdiction to decide this matter pursuant to 28 U.S.C. §§ 1331 and 1337. Id. (federal question).

For the following reasons, plaintiffs' motion for partial summary judgment is denied, and defendant's motion for summary judgment is granted.

II. Background

A. Facts

Plaintiffs Rob Senger, Mike Eliason, Jeff Fiferlick, Mario Gourde, Austin Hearnen, Rob Johnson, Brooks Kleffman, Tim A. Medenwald, and Keith A. Sharisky are all either current or former fire fighters or employees of defendant City of Aberdeen, South Dakota ("City"). (Pls.' & Def.'s Joint Stat. Stip. Facts ("JSSF") ¶ 1.) The City, for use by its public agency employees, implemented a work substitution arrangement, whereby workers were permitted to switch hours with a substitute co-worker. (JSSF ¶3.) The City's substitution policy was embodied in a "Standard Operating Guideline," entitled as the "Stand-in Policy." (Aberdeen Fire Dep't Stand. Op. Policy, dated January 1, 1998, at 1. See infra Par III § C, at 6.) The terms of the stand-in policy were incorporated in the joint statement of stipulated facts. (See JSSF §§ 2-5.)

While working for the City, plaintiffs were scheduled to work hours in excess of the hourly limits prescribed under the Act. (Id. ¶ 2.) The hours that plaintiffs were scheduled to work would have resulted in overtime pay for plaintiffs. (Id. ¶ 5.) When plaintiffs elected to switch hours with a substitute co-worker as part of the substitution arrangement, plaintiffs, as the originally scheduled employees, were not paid overtime wages for their scheduled hours. (Id. ¶ 4.) Thus, the City did not compensate plaintiffs for their scheduled overtime that a substitute coworker covered under the City's substitution program. (Id. ¶ 5.) In addition, the City did not credit the substitute employee for the hours worked for the originally scheduled employee, nor did the City compensate or pay overtime to the substitute employee who worked another employee's scheduled hours. (Id. ¶ 6.) The originally scheduled employees, however, were credited with the overtime hours for

the purposes of accruing paid leave, seniority, and benefits as if the employee had actually worked the overtime hours. (Id. ¶ 7.)

B. Issue

Is the City of Aberdeen required to pay overtime for work performed as or by a substitute?

III. Discussion

Plaintiffs argue that "the employee scheduled to work the shift in question should be credited with those shift hours for FLSA overtime purposes, even though a substitute employee actually worked those hours." (Pls.' P. & A. in Supp. of Summ. J. at 1.) According to plaintiffs, because the City "refuses to compensate the fire fighters for hours of work performed by a substitute as part of the approved stand-in exchange program[,]" and because the City does not "compensate the substitute fire fighter for the shift[,]" the City has violated provisions of the FLSA. (Id. at 1-2.) More specifically, plaintiffs seek damages and other remedies through two theories under the Act, asserting 1) that plaintiffs, as the originally scheduled employees, are entitled to overtime compensation for hours actually worked by a substitute; and, 2) when plaintiffs are the substituting employee, they are also entitled to overtime compensation. (Pls.' Compl. ¶ 8.)

The City, however, contends that the plain language of the Act is unambiguous and should be read to preclude employees from collecting overtime pay. (Def.'s Mot. in Supp. of Summ. J. at 3-6.) Through its interpretation of the Act, the City argues that "the statute clearly states that voluntarily substituted hours are excluded from overtime calculations." (Id. at 4.) Furthermore, the City maintains its distinction that even though the originally scheduled employee is permitted to receive "credit" for the work performed by a substitute co-worker for purposes of accruing paid leave, seniority, and benefits, there is no obligation on the employer to "compensate" an employee for overtime. (Id.)

A. Fair Labor Standards Act: 29 U.S.C. § 207(p)(3)

Because the parties have filed a joint statement of stipulated facts, the Court need only resolve the questions of law. At issue in this case is § 207(p)(3) of the Act, which states:

> If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, **the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.**

29 U.S.C. § 207(p)(3) (emphasis supplied). Since a City policy permits its fire fighters to substitute under the FLSA, this statute governs the Court's decision.

B. Implementing Rule: 29 C.F.R. § 553.31(a)

Pursuant to the Department of Labor's implementing rules of § 207(p)(3), 29 C.F.R. § 553.31(a) provides as follows:

> Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. **The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.**

Id. (emphasis supplied).

Although section 553.3 1(a) refers to "each employee" being "credited," the plain language of § 207(p)(3) of the Act controls. The relevant portions of the Act state that "[i]f an individual who is employed in any capacity by a public agency.

. . agrees . . . to substitute during scheduled work hours for another individual who is employed . . . in the same capacity, the hours such employee worked as a *substitute* shall be excluded . . . in the calculation of the hours" for the purpose of awarding overtime wages. Id. (emphasis added.) Accordingly, the substituting employee is explicitly precluded from receiving overtime compensation under § 207(p)(3) of the Act. Id.

In addressing plaintiffs' claim that the originally scheduled employee is entitled to overtime compensation for work actually completed by a substitute, § 207(p)(3) must then be read in conjunction with the Act's other overtime provisions. Section 207(a) requires the payment of overtime to those employees who have **worked** in excess of a statutorily prescribed period of time. See 29 U.S.C. § 207(a) (emphasis added).

Here, plaintiffs were scheduled to work in excess of the time prescribed by the FLSA, therefore entitling plaintiffs to overtime compensation for time spent in pursuit of the employer's needs. Plaintiffs, however, elected to substitute the hours scheduled with a stand-in co-worker, thereby allowing plaintiffs, the originally scheduled employee, to avoid any actual work. The substituting employee, then, would take on the burden to perform the work. The aim of the Act has been to "guarantee . . . overtime compensation for all *actual work* or employment." Tennessee Coal, Iron & R. Co., 321 US. at 597, 64 S. Ct, at 703. See Jewell Ridee Coal Corp., 325 U.S. at 167, 65 S. Ct, at 1067; Skidmore v. Swift & Co., 323 U.S. 134, 136-37, 65 S. Ct. 161, 163, 89 L. Ed. 124 (1944); Armour & Co. v. Wantock, 323 U.S. 126, 132, 65 S. Ct. 165, 168, 89 L. Ed. 118 (1944).

C. The City's Stand-In Policy

The Aberdeen Fire Department's Stand-In Policy provides as follows:

ABERDEEN FIRE DEPARTMENT
SUBJECT: STAND-IN POLICY
FROM: FIRE DEPARTMENT ADMINISTRATION
SOG#: 016
DATE: 1-1-98

DEFINITION: A "Stand-In" is an authorized, short term exchange of work schedule between employees with corresponding duties and working opposite shifts.

. . . .

PROCEDURES: GENERAL CONSIDERATIONS

A . . . . .

B. A stand-in is understood to be an agreement where two employees are given permission to substitute for one another and to hold each other accountable for pay back of time to one another. The City shall incur no additional wage responsibility or accrue any additional benefit liability because of a stand-in.

C . . . . .

D. A default in pay back of time shall be solely between the involved employees and shall not obligate the department for reimbursement.

E. [to O] . . . .

P. **Stand-in time will not be used in the computation of overtime pursuant to the Fair Labor Standards Act.**

(Aberdeen Fire Dep't Stand. Op. Policy, dated January 1, 1998, at 1-2 (emphasis supplied).)

Plaintiffs argue that each employee should be "credited as if he or she had worked his or her normal work schedule for that shift." 29 C.F.R. § 553.31. However, pursuant to 29 C.F.R. § 778.223, employees "must be compensated for all hours worked." Id. Again, plaintiffs are not working. Plaintiffs, though, are being compensated at their regular rate of pay, as well as accruing paid leave, seniority, and benefits for the work that was performed by a substitute.

The intent of § 207 precludes the awarding of overtime compensation to those who do not actually work. Tennessee Coal, Iron & R. Co., 321 U.S. at 597, 64 S. Ct. at 703; Jewell Ridge Coal Corp., 325 U.S. at 167, 65 S. Ct. at 1067; Skidmore, 323 U.S. 134, 136-37, 65 S. Ct. 161, 163; Armour & Co., 323 U.S. 126, 132, 65 S. Ct. 165, 168. By not working, the scheduled employee cannot collect overtime wages. Therefore, because "[s]tand-in time will not be used in the computation of overtime pursuant to the [FLSA]," the City's stand-in policy does not conflict with the Act. Under its stand-in policy, the City is in full compliance in its refusal to pay overtime to those

who do not actually work. To allow plaintiffs to collect overtime compensation would be in violation of the FLSA, as well as the City's Standard Operating Guideline.

V. Conclusion

Once plaintiffs relinquish a work shift (or part of a shift), plaintiffs are entitled to engage in their own personal pursuits once a co-worker has been substituted, thereby foregoing any opportunity to collect overtime compensation for work not actually performed. Moreover, the substituting employee is expressly excluded from receiving overtime compensation under the Act. Accordingly, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment (Docket #48) is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment (Docket #50) is granted.

Judgment is issued in favor of the defendant City of Aberdeen.

Dated this 16th day of September, 2005.

BY THE COURT:

/s/ Richard H. Battey

Richard H. Battey

United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3803

Rob Senger, et al,	*	
	*	
Appellants,	*	
	*	
v.	*	Order Denying
	*	Petition for Rehearing
City of Aberdeen,	*	and for Rehearing
South Dakota,	*	En Banc
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Beam would grant the petition for rehearing by the panel.

(5128-010199)

November 8, 2006

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

----------VIA TRANSMISSION----------

United States Court of Appeals for the Eighth Circuit
Circuit Clerks Office
Voice: 314-244-2400 Fax.: 314-244-2780

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29 U.S.C.A. § 216
United States Code Annotated Currentness
Title 29. Labor
Chapter 8. Fair Labor Standards
§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition

to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this

subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) Savings provisions

In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this chapter or the Portal-to-Portal Act of 1947 [29 U.S.C.A. § 251 et seq.] on account of his failure to comply with any provision or provisions of this chapter or such Act (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Civil penalties for child labor violations

Any person who violates the provisions of section 212 of this title or section 213(c)(5) of this title, relating to child labor, or any regulation issued under section 212 or section 213(c)(5) of this title, shall be subject to a civil penalty of not to exceed $10,000 for each employee who was the subject of such a violation. Any person who repeatedly or willfully violates section 206 or 207 of this title shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of any penalty under this subsection, when finally determined, may be--

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title or a repeated or willful violation of section 215(a)(2) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Except for civil penalties collected for violations of section 212 of this title, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the

violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title. Civil penalties collected for violations of section 212 of this title shall be deposited in the general fund of the Treasury.

VALIDITY OF SUBSEC. (B)

<The United States Supreme Court, in Alden v. Maine, 119 S.Ct. 2240, 144 L.Ed.2d 636, June 23, 1999, found that the powers delegated to Congress under Article I of the Constitution did not include the power to subject nonconsenting states to private suits for damages in state courts, as authorized by subsec. (b) of this section.>

29 U.S.C.A. § 207
United States Code Annotated Currentness
Title 29. Labor
Chapter 8 Fair Labor Standards
§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above

specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand

and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title, and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;
(3) Sums [FN1] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;
(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section, [FN2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if--

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning

of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are--

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such

employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or

understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one

month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of

employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee--

(1) is employed by such employer--

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment

in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such

employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3) (A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher [FN3]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;
(2) designed to provide reading and other basic skills at an eighth grade level or below; and
(3) does not include job specific training.

Code of Federal Regulations Currentness
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter V. Wage and Hour Division, Department of Labor
Subchapter A. Regulations
Part 553. Application of the Fair Labor Standards Act to Employees of State and Local Governments
Subpart A. General
Other Exemptions

§ 553.31 Substitution--section 7(p)(3).

(a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.

(b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the

employer, and (ii) exclusively for the employee's own convenience.

(c) A public agency which employs individuals who substitute or "trade time" under this subsection is not required to keep a record of the hours of the substitute work.

(d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

* * * * * * * *

ROB SENGER, MIKE ELIASON, JEFF FIFERLICK, MARIO GOURDE, AUSTIN HEARNEN, ROB JOHNSON, BROOKS KLEFFMAN, TIM A. MEDENWALD, and KEITH A. SHARISKY,	*	CIV. 04-1014
Plaintiffs,	*	**STATEMENT OF STIPULATED FACTS**
vs.	*	
CITY OF ABERDEEN, SOUTH DAKOTA,	*	
Defendant.	*	

* * * * * * * *

Rob Senger, Mike Eliason, Jeff Fiferlick, Mario Gourde, Austin Hearnen, Rob Johnson, Brooks Kleffman, Tim A. Medenwald and Keith A. Sharisky (hereinafter "Plaintiffs"), and the City of Aberdeen, South Dakota (hereinafter "Defendant"), hereby stipulate and agree that the following facts are true, and further agree to submit this controversy to the Court on the basis of these agreed upon facts:

1. Plaintiffs are firefighters and employees, or former employees, of Defendant City of Aberdeen, South Dakota.

2. While working for Defendant, Plaintiffs were scheduled to work hours in excess of the hourly *limits* prescribed in 29 USC § 207.

3. As part of an approved substitute arrangement, Plaintiffs may switch shifts with co-workers.

4. When Plaintiffs elected to switch hours with a substitute co-worker as part of the approved substitute arrangement, Plaintiffs were not paid overtime wages for those hours.

5. Although the hours would have resulted in overtime pay for the Plaintiff for whom they were scheduled, the Defendant did not pay overtime wages to the Plaintiff for the hours that a substitute co-worker worked through the approved substitute arrangement.

6. The Defendant did not credit the substitute employee for the hours worked for the originally scheduled employee, nor did the Defendant compensate or pay overtime to the substitute or stand-in employee who worked another employee's scheduled hours through an approved substitution arrangement.

7. Plaintiffs were credited with the overtime hours for the purposes of accruing paid leave, seniority and benefits as if they had actually worked the overtime hours.

Dated: 04-21-05 WOODLEY & MCGILLIVARY

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No. 06-1093

IN THE

Supreme Court of the United States

CITY OF ABERDEEN, SOUTH DAKOTA
Petitioner,

v.

ROB SENGER, MIKE ELIASON, JEFF FIEERLICK, MARIO GOURDE, AUSTIN HEARNEN, ROB JOHNSON, BROOKS KLEEMAN, TIM A. MEDENWALD AND KEITH A. SHARISKY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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April 2007

QUESTION PRESENTED

Should this Court review the Eighth Circuit's decision interpreting the Fair Labor Standards Act and the Department of Labor's longstanding regulation to require payment of overtime to a fire fighter, who is scheduled to work overtime but has a colleague substitute for him/her under Section 207(p)(3), when there is no conflict with this Court's precedent and no split among the U.S. Courts of Appeals on this issue?

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INTRODUCTION

The Respondent fire fighters have all been scheduled to work overtime hours but have had co-workers substitute for parts of their shifts. Their employer, the Petitioner City of Aberdeen, refused to pay the Respondent fire fighters overtime wages for the hours worked by the substitute. In doing so, the City ignored the plain language of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the Department of Labor's 20-year-old regulation, 29 C.F.R. § 553.31, that requires payment of overtime wages to the substituted-for employee. The City argues that the regulation is contrary to the statute and maintains, without citing *any* caselaw interpreting the trading time portion of the FLSA, that the Eighth Circuit erred in relying on this regulation.

Despite the City's assertions, there simply is no conflicting authority from this Court, or any other, regarding trading time. The cases cited by the City address other issues such as portal-to-portal time, meal periods, and annual leave, none of which have any bearing on the special statutory framework of fire fighters trading time under sections 207(p)(3) and 207(k). Notably, this Court's decisions cited by the City, *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and *Steiner v. Mitchell*, 350 U.S. 247 (1956), do not even remotely touch on fire fighters' substitution of shifts. Since the Eighth Circuit's decision does not conflict with existing law, this Court's review is unnecessary.

Moreover, the Eighth Circuit properly held that the language of the FLSA did not reveal any intent to deny the Respondent fire fighters overtime wages. The Eighth Circuit examined the statute and found that the general rule regarding overtime wages in section 207(a) was inapplicable to situations in which an employer had willingly applied the trading time framework in section 207(p)(3). Reading section 207(p)(3) with section 207(k), which allows employers to

calculate overtime for fire fighters differently in keeping with their unique schedules, the Eighth Circuit found that Congress intended 207(p)(3) to ensure that both employees who trade time are "credited" as if s/he had worked his/her normal shift.

Significantly, the Eighth Circuit's decision validates the trading time practice of public employers under 207(p)(3) for at least the last 20 years since the provision was enacted, and a practice which Congress recognized as applicable to fire fighters as early as 1974. Employers are protected, not harmed, by the Eighth Circuit's holding that the employer need only pay the overtime wages that it intended to pay for the overtime hours it scheduled. Most employers' recognition of this may partially explain the lack of caselaw available for the Petitioner to cite in favor of a position that could be considered an outlier among most similarly situated employers who are accustomed to complying with the FLSA and section 207(p)(3). Thus, the Eighth Circuit's decision is not of such substantial importance as to warrant review by this Court.

STATEMENT OF THE CASE

Factual Background

While working for the City of Aberdeen, the Respondent fire fighters were scheduled to work hours in excess of the hourly limits prescribed in section 207(k). The parties agree that if each fire fighter had worked all of the scheduled hours in his/her shifts during the work periods at issue, s/he would have been entitled to overtime wages for the hours in excess of the statutory maximum. However, pursuant to the City's stand-in or trading time policy, the Respondent fire fighters (the "scheduled" or "substituted for" employees) had colleagues substitute for them for shifts during the work periods at issue.

Under the City's stand-in policy, authorized by section 207(p)(3), the stand-in employees received absolutely *no* compensation from the City for their stand-in work.[1] Instead, the City paid the scheduled employee only regular wages for the stand-in employees' work. The City maintained that section 207(p)(3) allows it to deny both employees overtime wages for the overtime hours the substitutes work. It refused to apply the Department of Labor's longstanding regulation requiring that each fire fighter must be compensated as if "he or she worked his or her normal schedule." 29 C.F.R. § 553.31(a). Thus, the City received the benefit of overtime work without paying overtime wages to *any* fire fighter.

Procedural History

On July 6, 2004, the Respondent fire fighters filed their complaint against the City of Aberdeen alleging violations of the FLSA based on the City's failure to pay overtime wages to either the substituted-for or stand-in employees and the City's refusal to abide by the Department of Labor's 20-year-old regulation regarding substitution of time. The parties agreed to a joint stipulation of facts, and then filed cross motions for summary judgment. On September 16, 2005, the U.S. District Court for the District of South Dakota denied the fire fighters' motion for partial summary judgment on liability and granted the City's motion for summary judgment.

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[1] Contrary to the Petitioner's assertions, the fire fighters do *not* concede "that the substitutes are not entitled to overtime wages for traded hours they worked." Pet. 4. The substitutes are not entitled to overtime wages for the traded hours they worked *only if* the City complies with section 207(p)(3) by paying the substituted-for employee overtime wages for the traded time. If the City chooses not to comply with the exception contained in section 207(p)(3) by paying the substituted-for employee overtime wages, then section 207(a) applies and the City must pay the stand-in employee overtime wages for any hours that exceed the statutory maximum in his/her schedule.

The U.S. Court for Appeals for the Eighth Circuit reversed the district court's decision, holding that Section 207(p)(3) requires public employers (who elect to allow their employees to substitute shifts) to pay wages, including overtime wages, to each employee "as if he or she had worked his or her normal schedule." Pet. A6 (quoting H.R. Rep. No. 99-331, at 25 (1985); S. Rep. No. 99-150, at 13 (1985)). *See also* 29 C.F.R. § 553.31(a). The Eighth Circuit held that the plain language of the relevant provisions of the FLSA that pertain to fire fighters "does not reveal a Congressional intent to deny an employee overtime wages when another worker voluntarily substitutes for him or her with the employer's permission." Pet. A5.

The City's petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT PROPERLY INTERPRETED SECTION 207(P)(3) OF THE FLSA.

Given the lack of conflicting authority regarding the interpretation of section 207(p)(3), this Court should deny the writ as the Eighth Circuit properly considered the language of the FLSA, the legislative history, and the Department of Labor's regulations.

A. There is No Conflicting Authority Regarding Whether a Substituted-For Employee is Entitled to Overtime Compensation Under Section 207(p)(3).

The Petitioner cites no decisions from any court, at any level, besides the initial district court decision in this matter, that conflict with the Eighth Circuit's decision interpreting section 207(p)(3) of the FLSA. Instead, the Petitioner attempts to create a conflict where none exists, arguing that

decisions regarding other provisions of the FLSA contradict the Eighth Circuit's interpretation of 207(p)(3).

Not only does the Petitioner fail to cite a single case evidencing a conflict between the circuits, it also fails to cite *any* case interpreting section 207(p)(3). Instead, it distracts the Court with cases pertaining to payment of overtime wages for portal-to-portal time, meal periods, and leave pay—many of which were decided from 1944 to 1967, well before section 207(p)(3) was enacted. Several of the cases on which the Petitioner relies deny employees overtime because of their failure to participate in "actual work or employment." However, even the Petitioner admits that these cases stem from interpretations of section 207(a) not 207(p)(3). Pet. 11. None address the trading time provision, the subject presented here.[2]

The decision below is in harmony with this Court's precedent and does not conflict with portal-to-portal decisions determining that employees must be compensated for "actual work or employment." *Tennessee Coal*, 321 U.S. at 597. This Court has not spoken to whether fire fighters' substitutions under sections 207(p)(3) and 207(a) constitute "actual work or employment." There is no reason why "actual work or employment" under the Court's precedent does not

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[2] The cases cited by the City simply are not on point. *See* Pet. 14-16. *See also Joseph G. Moretti Inc. v. Boogers*, 376 F.2d 27 (5th Cir. 1967) (holding that employees can be required to work on Saturdays under a fluctuating work week and that an employee cannot be compensated for meal periods and portal time); *Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995) (clarifying that night differentials, hazardous duty pay, and education bonuses may not be excluded from the regular rate of pay but the absence of medical claims and unused sick leave bonuses may be excluded); *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987) (interpreting Title 5's "leave with pay" statutes' application to federal fire fighters); *Local 889, AFSCME v. Louisiana*, 145 F.3d 280 (5th Cir. 1998) (holding that correctional officers were not entitled to overtime when they did not work over the maximum hours threshold).

include what Congress has decided to define as actual work or employment under 207(p)(3), in the shift-trading context, to include paying fire fighters for time "actually worked" by another employee.

Moreover, to the extent that *Tennessee Coal* is applicable, it reinforces the appellate court's decision requiring the employer to pay overtime wages for overtime work scheduled and performed. Indeed, this Court stated:

> We are not guided by any precise statutory definition of work or employment. . . . But these provisions, like other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

Id. In this regard, the Eighth Circuit's decision follows *Tennessee Coal* rather than conflicts with it. In keeping with the humanitarian purpose of the FLSA, while also protecting employers, the Eighth Circuit interpreted sections 207(p)(3) and 207(k) to require an employer to pay overtime wages for hours actually worked by the substitute, but limited the overtime wages to the hours that the substituted-for employee was originally scheduled by the employer.

As no conflicting authority exists, the appellate court's decision does not require this Court's review.

B. The Eighth Circuit Properly Considered the Plain Language of the FLSA and the Legislative History Regarding Overtime Compensation for the Substituted-For Employee as Well as the Department of Labor's 20-Year-Old Regulation.

In interpreting section 207(p)(3), the Eighth Circuit followed the general rule that when construing a statute a court must first examine the language of the statute to determine whether it "clearly demonstrate(s) what Congress intended." Pet. A3-A4. If the intent from the statute is clear, the inquiry ends. *Id.* (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984)).

Section 207(a) sets forth the general rule for overtime compensation under the FLSA by limiting the hours employers may schedule employees to work within a work period to 40 hours before overtime wages are required:

> *Except as otherwise provided in this section*, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (emphasis added).

Sections 207(b), (f), (g), and (i)-(o) of the FLSA set forth numerous exceptions to the general overtime rule provided in Section 207(a). Section 207(k), added by the 1974 FLSA Amendments, establishes a partial exception for public employers of fire protection or law enforcement employees from the Act's general overtime requirements based on the public's need to have safety personnel work long shifts.

Under section 207(k), an employer can avoid violating section 207(a) by establishing a work period of seven to 28 consecutive days and paying overtime for hours that exceed at the outer limit 212 hours in a 28-day period. The alternative maximum hour threshold allowed under the Section 207(k) exception provides public employers the benefit of scheduling fire fighters long shifts (often 24-hour shifts) to provide for public safety without incurring significant overtime liability in the standard 40-hour work week.

In yet another exception to section 207(a), the 1985 FLSA Amendments in section 207(p)(3) recognized a longstanding practice of fire fighters—the practice of substituting for one another during scheduled shifts, sometimes called "trading time." The text of section 207(p)(3) sets forth requirements for the substitution practice underscoring that the substitution be allowed only at the approval of the employer. The plain language of section 207(p)(3) describes the employer's overtime obligations to the stand-in employee (notably none) but does not describe the employer's obligations to the scheduled or substituted-for employee. Because the statute is silent with regard to the calculation of overtime wages for the substituted-for employee, the Eighth Circuit appropriately turned to the legislative history and the Department of Labor's regulation implementing section 207(p)(3).

The Petitioner's argument that section 207(a) prohibits overtime payment to the substituted-for employee cannot be supported by the statute's framework. Following canons of statutory interpretation, the Eighth Circuit examined the language of the FLSA and found no support for the Petitioner's argument that section 207(a) required an employee to be "engaged" in commerce to receive overtime under section 207(p)(3). The court held that the term "engaged in commerce" was an "applicational threshold," and "[t]he word 'engaged' therefore relates not to whether the

employee was actively working, but whether the employee's or enterprise's work was of a certain kind." Pet. A4.

The Eighth Circuit also reasoned that the City's argument that fire fighters must be "engaged" in work to receive overtime wages was further invalidated because the Petitioner willingly adopted the alternative overtime scheme in section 207(k).[3] The Eighth Circuit examined the relationship between section 207(a) and section 207(k) and found that section 207(k), in setting forth an alternative maximum hour scheme for fire fighters, articulated an alternative to section 207(a). The court held:

> We see no indication in § 207(k) that all of those hours [the hours used to calculated overtime wages] must be worked by the employee him- or herself. We therefore conclude that the FLSA's plain language does not reveal a Congressional intent to deny an employee overtime wages when another worker voluntarily substitutes for him or her with the employer's permission.

Pet. A5.

Once the Eighth Circuit determined that the statute was silent with regard to payment of overtime wages to the substituted-for employee, it properly turned to the legislative history of the FLSA. The legislative history makes clear that Congress intended that the computation of overtime for both employees must not be affected by the substitution of time under section 207(p)(3). Thus, the scheduled employee must be paid for the overtime worked by the substitute.

Both the Senate and House Reports emphasized that public employers have allowed employees to substitute time

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[3] Contrary to Petitioner's assertion, the Eighth Circuit did not hold that section 207(a) is inapplicable to all fire fighters. Instead, the court questioned the applicability of section 207(a) when an employer has chosen to comply with 207(k) instead.

"without affecting the computation of overtime for *either* employee." H.R. Rep. No. 99-331, at 25 (1985) (emphasis added); *See also* S. Rep. No. 99-159, at 13 (1985) *reprinted in* 1985 U.S.C.C.A.N. 651, 661. The Congressional Reports explained, in nearly identical language: "If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule." *Id.*

The Eighth Circuit properly understood that the House and Senate Reports express "a clear indication that the purpose of § 207(p)(3) was to fashion a way to allow voluntary substitutions without having overtime costs spiral out of control. By having the employer credit each employee for the shift to which s/he was scheduled, the subsection limits the amount that an employer will have to pay in overtime wages to no more than it would have paid absent the voluntary shift substitutions." Pet. A6.

Thus, the legislative history aided the Eighth Circuit in understanding that Section 207(p)(3) was intended to require payment of overtime wages to the scheduled employee. Moreover, the Eighth Circuit simultaneously considered the legislative history with the plain language of the Department of Labor's regulation interpreting the statute because the text of 29 C.F.R. § 553.31 is taken directly from the House and Senate Reports.

In general, when a statute is silent with respect to an issue, the reviewing court, in addition to examining legislative history, must respect the implementing agency's construction of the statute. *Chevron*, 467 U.S. at 843. In this case, because the language of the Department's regulation is identical to the language of the Congressional Reports regarding section 207(p)(3), the Eighth Circuit easily found that the regulation deserved respect. Noting that the regulation "used exactly the same language" as the House and Senate Reports, the Eighth Circuit held that 29 C.F.R. § 553.31

"is therefore fully consistent with the clearly expressed intent of Congress." Pet. A6.

Because the Eighth Circuit found that the agency's regulation reasonably reflected Congress' intent, the Eighth Circuit properly considered the Department's 20-year-old regulation, a regulation which *never* before had been challenged in the courts. The court's consideration of a longstanding regulation that mirrors the language of the House and Senate Reports does not provide any grounds for this Court's review.

C. The Eighth Circuit Properly Respected the Department of Labor's Interpretation of Its Regulation in Its *Amicus Curiae* Brief Supporting the Respondent Fire Fighters and in the Regulation Itself.

After deferring to the Department's reasonable regulation, the Eighth Circuit noted that the term "credited" in the regulation was unclear with regard to payment of overtime wages to the scheduled employee. *Id.* Consistent with this Court's holding in *Auer v. Robbins*, 519 U.S. 452 (1997), the Eighth Circuit then looked to the Department of Labor's interpretation of its regulation to determine whether it was "plainly erroneous."

Finding that the Department's interpretation was not plainly erroneous based on the text of the FLSA and the legislative history, the Eighth Circuit noted that the Department of Labor consistently interpreted the term "credited" to include "compensation." Pet. A6 (citing *Application of the Fair Labor Standards Act to Employees of State and Local Governments*, 52 Fed. Reg. 2012, 2018 (Jan 16, 1987)). Furthermore, the Department of Labor's *amicus* brief reiterated that the Secretary interprets the term "credited"—as used in its regulation (and in the legislative history)—to require the employer to treat the scheduled

employee as if s/he had worked his/her shift. Labor Br. at 23. The Eighth Circuit's reasonable reliance on the Department's interpretation of its own regulation, which has been in effect for over two decades, does not merit review by this Court.

D. The Eighth Circuit's Decision Preserves Congress's Intent to Protect Public Employers from Excess Overtime Liability.

The City acknowledges that Congress intended 207(p)(3) to encourage employers to continue the longstanding practice of trading shifts. The Eighth Circuit's decision preserves Congress' intent to allow trading time without public employers incurring significant excess overtime liability. H.R. Rep. No. 99-331, at 25 (1985); S. Rep.No. 99-159, at 13 (1985). Moreover, as the Eighth Circuit explained, the protections afforded the employer in the regulation ensure that employers face no additional burdens when they allow their employees to trade time:

> All the City has to do is pay the scheduled employee as if he or she had worked the scheduled shift; it need not keep any additional records. And the City need not monitor all shift exchanges, because any voluntary substitutions that take place will not cause the employer's actual overtime expenditures to vary from the expectations that it developed when it first scheduled the employee.

Pet. A7.

The City's argument that the Eighth Circuit's decision will encourage employees to abuse shift substitution is unfounded. First, if employers are concerned about abuse of shift substitution, they can simply disallow any substitutions. Section 207(p)(3) does not require shift substitution; it merely allows an employer to permit it. Abuse is also unlikely given that public employers and employees have engaged in shift substitution since before the passage of section 207(p)(3) in

1985. In fact, Congress acknowledged fire fighters' practice of trading time as early as the 1974 FLSA Amendments. *See* 120 Cong. Rec. S8760. If section 207(p)(3) and 29 C.F.R. § 553.31 varied substantially from the practice of public employers when they were enacted in 1985 and promulgated in 1987, litigation would have resulted soon after. Instead, there has been none. Consequently, the Eighth Circuit's decision is not of such substantial importance as to warrant this Court's review. The practice of public employers under 207(p)(3) for the last 20 years has been that "the employee scheduled to work receives credit (and compensation) as if he or she had worked." 52 Fed. Reg. at 2018. The Eighth Circuit's decision affirms this well-settled practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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